IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JEREMY E. DUNCAN, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13036 Trial Court No. 3VA-13-00034 CI SUMMARY DISPOSITION No. 0032 — May 15, 2019

Appeal from the Superior Court, Third Judicial District, Palmer, Jonathan A. Woodman, Judge.

Appearances: Jason A. Weiner, Gazewood & Weiner, PC, Fairbanks, under contract with the Office of Public Advocacy, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, Fabe, Senior Supreme Court Justice, and Andrews, Senior Superior Court Judge.[*]

Jeremy E. Duncan appeals the dismissal of his application for post-conviction relief.

[*] Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Duncan was convicted of sexually abusing a twenty-month-old girl by sticking his finger into her vagina. The primary evidence at trial was the girl's physical injuries and Duncan's statements to police admitting the conduct. We affirmed his conviction on direct appeal.[1]

Duncan then filed a petition for post-conviction relief. Duncan claimed that he had requested an attorney prior to making his inculpatory statements to police, and that his trial attorney was ineffective in failing to file a motion to suppress those statements.

The superior court rejected Duncan's claim on the ground that the audio recording Duncan relied on for factual support did not clearly indicate that Duncan had made a request for counsel. The superior court noted that Duncan's trial counsel stated that neither he nor his colleagues could clearly understand what had been said. The superior court also "independently listened to the recording multiple times at maximum volume and with noise-cancelling headphones" and was "unable to discern what Mr. Duncan actually said." The court therefore concluded that Duncan had failed to prove that his proposed suppression motion would have been successful.[2]

Duncan now appeals. He argues that the audio recording demonstrates that he requested an attorney prior to making his inculpatory statements to police, and that this fact establishes both that Duncan's trial counsel was incompetent (because he failed to recognize Duncan's request and file a motion to suppress), and that Duncan was prejudiced (because the motion would have been successful had it been filed).

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[1] *Duncan v. State*, 2011 WL 2084085 (Alaska App. May 25, 2011) (unpublished).

[2] *See State v. Steffensen*, 902 P.2d 340, 342 (Alaska App. 1995) ("[W]e conclude that *Risher* requires proof that the proposed suppression motion would have been granted and, additionally that there is at least a reasonable possibility that the outcome of the trial court proceedings would have been different had the evidence been suppressed.").

But we have listened to the recording, and we reach the same conclusion as the superior court: we are unable to discern what Duncan actually said. We therefore agree with the superior court that Duncan failed to establish that his proposed suppression motion would have been successful, and we further agree that this deficiency is fatal to his petition for post-conviction relief.[3]

We note that Duncan also makes one other argument on appeal: that under *Risher v. State* he should not be required to prove that his suppression motion would have been successful in order to succeed in his claim for post-conviction relief.[4] This view is inconsistent with our case law interpreting *Risher*.[5] If Duncan is asking us to overrule a prior decision, he must "demonstrate convincing reasons why the existing rule 'was originally erroneous or is no longer sound because of changed conditions.'"[6] He must also show "that more good than harm would result from a departure from precedent."[7] Duncan has failed to meet this burden.

The judgment of the superior court is AFFIRMED.

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[3] *Id.*

[4] *Risher v. State*, 523 P.2d 421 (Alaska 1974).

[5] *Steffensen*, 902 P.2d at 341-43.

[6] *Erickson v. State*, 950 P.2d 580, 587 (Alaska App. 1997) (quoting *State v. Dunlop*, 721 P.2d 604, 610 (Alaska 1986)).

[7] *Id.*